

Updates: Criminal Procedure Monograph 6—Pretrial Motions (Third Edition)

Part 2—Individual Motions

6.18 Motion to Suppress Confession Because of a *Miranda* Violation

6. The Requirements for a Valid Waiver of *Miranda* Rights

Insert the following case summary after the quoted text near the top of page 39:

A deaf defendant cannot knowingly and voluntarily waive his or her *Miranda** rights when the interrogating officers fail to: (1) allow an interpreter to explain the contents of a written form to the defendant; (2) conclusively determine whether the defendant can read the form; (3) inform the defendant that his or her signature effects a waiver of the rights; and (4) communicate in full the rights contained in the form. *People v McBride*, 273 Mich App 238 (2006).

In *McBride*, police officers arrested a defendant who was deaf and did not question her until a sign language interpreter arrived. The interview was videotaped and captured the defendant's nonverbal responses during the interview. Before questioning the defendant, the officers talked with the defendant about her *Miranda* rights. When the defendant indicated that she was not familiar with these rights, she was asked whether she could read and write. In response, the defendant shrugged her shoulders. The interpreter interpreted the gesture as an affirmative response, and the officers provided the defendant with a written notice of her constitutional rights so that she could "follow along" with the officers as they informed her of those rights. In the officers' verbal communication of the written form, parts of some rights were combined with others, and some parts were omitted entirely. When she was informed of her right to an attorney, the defendant used sign language to ask if she needed a lawyer. The officers responded only that she had a right to an attorney. They "failed to inform [the defendant] that she had the right to the presence of an attorney *during the questioning*." *McBride, supra* at 258. After

**Miranda v Arizona*, 384 US 436 (1966).

reading the constitutional rights form to the defendant, the officers asked her to sign it to show that the officers had read the form to her. The defendant

“appeared to pause and read the form, and then she signed her name at the bottom. . . . [The interpreter] was never given the opportunity before or during the interview to review the form or to interpret the omitted portions of each right that [the officers] failed to read.” *McBride, supra* at 244.

Under the circumstances, the *McBride* Court concluded that the trial court did not clearly err in determining that the defendant could not read and did not understand the constitutional rights form presented to her. According to the Court, “there [was] no indication in the record that [the defendant] understood all the rights as translated to her.” *Id.* at 256. The Court further explained:

“[T]he use of a written form was inadequate in light of [the defendant’s] noncommittal response regarding whether she could read and comprehend the constitutional rights form, and the police officers’ failure to further question [the defendant] regarding her limitations. . . .

“More importantly, the record shows that [the interpreter] was not given the opportunity to translate the form itself for [the defendant]. Thus, [the defendant] could not have made an intelligent waiver because the specific *Miranda* warnings were not adequately explained to defendant by an interpreter.” *McBride, supra* at 257.

The Court disagreed, however, with the trial court’s conclusion that the defendant’s question about needing a lawyer demonstrated her belief that she should have one and required the officers to cease questioning her. The defendant’s inquiries, “do I need a lawyer?” and “aren’t I supposed to have a lawyer?”, were not sufficient to properly invoke her constitutional right to counsel. The defendant’s inquiries, according to the Court, “were simply that, inquiries, not unequivocal demands for counsel.” *McBride, supra* at 258-259.

Part 2—Individual Motions

6.21 Motion to Compel Discovery

3. Discovery of Privileged or Confidential Information

Effective December 29, 2006, 2006 PA 557 enacted MCL 600.2157b to specify the circumstances in which a party to a criminal proceeding may obtain access to records of confidential communication to a crime stoppers organization. Insert the following text immediately before subsection (4) near the middle of page 50:

Subject to certain exceptions, confidential communication to a crime stoppers organization is privileged. MCL 600.2157b(1) prohibits requiring a person to:

“(a) Disclose, by way of testimony or otherwise, a confidential communication to a crime stoppers organization.

“(b) Produce, under subpoena, any records, documentary evidence, opinions, or decisions relating to a confidential communication to a crime stoppers organization by way of any discovery procedure.”

Records of confidential communication to a crime stoppers organization may be subject to disclosure under the following circumstances:

“(2) An individual arrested and charged with a criminal offense . . . may petition the court for an inspection conducted in camera of the records of a confidential communication to a crime stoppers organization concerning that individual. The petition shall allege facts showing that the records would provide evidence favorable to the defendant . . . and relevant to the issue of guilt or punishment If the court determines that the person is entitled to all or any part of those records, the court may order production and disclosure as it deems appropriate.

“(3) The prosecution in a criminal proceeding may petition the court for an inspection conducted in camera of the records of a confidential communication to a crime stoppers organization that the prosecution contends was made by the defendant, or by another individual acting on behalf of the defendant, for the purpose of providing false or misleading information to the crime stoppers organization. The petition shall allege facts showing that the records would provide evidence supporting the prosecution’s contention and would be relevant to the issue of guilt or punishment. If the court determines that the prosecution is entitled

to all or any part of those records, the court may order production and disclosure as it deems appropriate.

“(4) As used in this section:

“(a) ‘Confidential communication to a crime stoppers organization’ means a statement by any person, in any manner whatsoever, to a crime stoppers organization for the purpose of reporting alleged criminal activity.

“(b) ‘Crime stoppers organization’ means a private, nonprofit organization that distributes rewards to persons who report to the organization information concerning criminal activity and that forwards the information to the appropriate law enforcement agency.” MCL 600.2157b(2)-(4).

Part 2—Individual Motions

6.29 Motion to Withdraw Guilty Plea

Discussion

Insert the following text before the paragraph beginning with “Doubt about the veracity of a defendant’s nolo contendere plea...” on page 75:

When a defendant pleads guilty to an offense and may be sentenced according to the sentencing guidelines for habitual offenders, a trial court must inform the defendant of the maximum *enhanced* sentence possible in order for the defendant to tender an understanding plea as required by MCR 6.302. *People v Boatman*, 273 Mich App 405 (2006). The validity of a defendant’s plea to an offense for which he or she is to be sentenced as a habitual offender is questionable when the defendant is informed only of the maximum sentence permitted for a first conviction of the offense. *Id.* at 412. According to the *Boatman* Court, the sentencing court’s failure to specify whether the maximum sentence to which it was referring was based on the habitual offender or the first-time offender guidelines “constituted a procedural flaw that resulted in the failure to properly inform defendant of the consequences of his plea, rendering it unintelligent.” *Id.* at 412.

Part 2—Individual Motions

6.35 Motion to Admit Evidence of Victim’s Prior Sexual Conduct in Criminal Sexual Conduct Cases

4. Cases Addressing the Defendant’s Rights to Confrontation and to Present a Defense

Insert the following text before the last paragraph on page 94:

In reversing the Court of Appeals and remanding the case to the trial court for retrial,* the Michigan Supreme Court stated:

“[T]he defendant must be afforded the opportunity to introduce testimony that the complainant has previously been induced by his father to make false allegations of sexual abuse against other persons disliked by the father. MRE 404(b). Such testimony concerning prior false allegations does not implicate the rape shield statute. MCL 750.520j.” *People v Jackson*, 477 Mich 1019 (2007).

**People v Jackson*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2003 (Docket No. 242050).

Part 2—Individual Motions

6.36 Motion to Suppress Evidence Seized Pursuant to a Defective Search Warrant

Insert the following case summary before the February 2006 update to page 98:

An affidavit in support of a search warrant that “references facts supporting a finding that a place over which defendant has control would contain evidence of a crime” but that fails to connect the defendant to the place to be searched “does not allow a reasonably cautious person to conclude that evidence of a crime is in the stated place.” *People v Osantowski*, ___ Mich App ___ (2007). However, the omission of that information does not necessarily require the exclusion of evidence obtained as the result of a search executed on the basis of the invalid warrant.

In *Osantowski*, the defendant, whose last name was the same as his father’s, resided in a house belonging to his father. The affidavit in support of the warrant clearly identified the location and residence to be searched and noted that the vehicle parked in the driveway was registered to the defendant’s father. Nowhere in the affidavit was there information indicating that the defendant lived at the residence or had any other connection with the residence described in the affidavit. Because the officers involved were aware that the defendant and his father lived at the residence (during the morning on which the search took place, both the defendant and his father were arraigned on unrelated charges), the Court concluded that

“the affidavit’s failure in this instance [was] merely a good-faith oversight and not the product of police misconduct. Accordingly, the stated purpose of the exclusionary rule, to deter police misconduct, would not be served by applying the rule on the basis of the affidavit’s identified deficiency.” *Id.* at ____.

Part 2—Individual Motions

6.37 Motion to Suppress Evidence Seized Without a Search Warrant

1. Searches of Automobiles for Evidence

Insert the following text after the existing text on page 103:

A warrantless search of a backpack placed on the floorboard at a passenger's feet may not be justified on the basis of the driver's consent to search the vehicle when no evidence was presented that the backpack belonged to the driver or that the driver possessed common authority over the backpack. *People v LaBelle*, 273 Mich App 214, 222–225 (2006).

Updates: Criminal Procedure Monograph 6—Pretrial Motions (Third Edition)

Part 2—Individual Motions

6.18 Motion to Suppress Confession Because of a *Miranda* Violation

3. Invocation of *Miranda* Rights

Insert the following text after the first paragraph in this subsection on page 36:

See also *People v Reginald Williams*, ___ Mich App ___ (2007), where the defendant unsuccessfully claimed that a second custodial interrogation violated his *Miranda** rights because his earlier refusal to reduce his first statement to writing constituted an invocation of his right to silence.

**Miranda v Arizona*, 384 US 436 (1966).

Part 2—Individual Motions

6.19 Motion to Suppress Confession for Violation of Sixth Amendment Right to Counsel

Replace the April 2006 update to page 42 with the following case summary:

**People v Frazier*
(*Frazier I*), 270
Mich App 172,
179-180
(2006).

Although the Michigan Supreme Court was bound by the federal district court's habeas corpus decision concerning the defendant's ineffective assistance of counsel claim, the Court discussed "the correctness of this analysis" because the Court of Appeals endorsed the federal court's decision in a published opinion.* *People v Frazier (Frazier II)*, ___ Mich ___ (2007). The Supreme Court determined that the federal court wrongly determined that the defendant's confession was inadmissible because the federal court incorrectly considered the defendant's ineffective assistance claim under the standard in *United States v Cronin*, 466 US 648 (1984), rather than under the test in *Strickland v Washington*, 466 US 668 (1984).

In *Frazier I*, the Court of Appeals agreed with the federal district court's conclusion that "the prosecution could not use defendant's custodial statements in its case-in-chief because counsel had abandoned defendant at a critical stage of the proceedings (the police interrogation)," and that counsel's conduct constituted a violation of the defendant's Sixth Amendment right to counsel under *Cronic*. In *Frazier II*, the Supreme Court concluded that the federal district court's *Cronic* analysis was improper because "[t]he *Cronic* test applies when the attorney's failure is *complete*, while the *Strickland* test applies when counsel failed at specific points of the proceeding." According to the *Frazier II* Court, "[b]ecause counsel consulted with defendant, gave him advice, and did nothing contrary to defendant's wishes, counsel's alleged failure was not complete." *Frazier II*, *supra* at ___.

Even though the *Frazier II* Court could not disturb the federal court's ruling under *Cronic*—that defense counsel's conduct violated the defendant's constitutional right to counsel, the Court pointed out that the exclusionary rule was not appropriate under the circumstances of the case. Although the exclusionary rule may be an appropriate remedy for a Sixth Amendment violation, the *Frazier II* Court explained that "[e]xcluding defendant's confession because of attorney error does not fulfill the goal of the exclusionary rule by deterring the police from future misconduct." The Court also noted that derivative evidence obtained as a result of the defendant's confession, but in the absence of any interference by police with the defendant's counsel, was similarly not subject to the exclusionary rule. The *Frazier II* Court further commented that even if the defendant's confession did result from police misconduct, the exclusionary rule did not apply to the street sweepers' testimony because any connection between the misconduct involved in obtaining the defendant's confession was sufficiently attenuated to dissipate any taint.

On the basis of its analysis, the *Frazier II* Court reversed the *Frazier I* Court's holding that subjected the street sweepers' testimony to the exclusionary rule. In addition, the Court vacated the *Frazier I* Court's endorsement of the federal court's application of *Cronic* to the defendant's ineffective assistance claim. *Frazier II*, *supra* at ____.

Part 2—Individual Motions

6.24 Motion to Dismiss Because of Double Jeopardy— Multiple Punishments for the Same Offense

Insert the following text after the first quoted paragraph on page 62:

**Blockburger v
United States,*
284 US 299
(1932).

The *Blockburger** test for determining whether the protection against double jeopardy prohibits multiple prosecutions is the appropriate test for determining whether double jeopardy considerations bar multiple punishments. *People v Bobby Lynell Smith*, ___ Mich ___ (2007). In *Smith*, the Michigan Supreme Court expressly stated that the definition of “same offense” for purposes of the multiple punishments strand of the prohibition against double jeopardy is the same as the definition of “same offense” determined by the Court in *People v Nutt*, 469 Mich 565 (2004), for purposes of the multiple prosecutions strand.

Part 2—Individual Motions

6.28 Motion to Suppress the Fruits of an Illegal Seizure of a Person

Insert the following text after the existing text on page 72:

A passenger in a vehicle stopped by the police is seized for purposes of the Fourth Amendment and may properly challenge the constitutionality of the traffic stop. *Brendlin v California*, 551 US ____ (2007). According to the *Brendlin* Court, the passenger's formal arrest did not constitute the time at which the passenger was seized; rather, the passenger was seized at the moment the car in which he was riding came to a stop on the side of the road.

Part 2—Individual Motions

6.37 Motion to Suppress Evidence Seized Without a Search Warrant

1. Searches of Automobiles for Evidence

Replace the January/February/March 2007 update to page 103 with the following text:

The Michigan Supreme Court reversed the Court of Appeals decision in *People v LaBelle (LaBelle I)*, 273 Mich App 214 (2006), and ruled that the search of the defendant's backpack did not violate her constitutional right to be free of unreasonable searches and seizures. *People v LaBelle (LaBelle II)*, ___ Mich ___ (2007). According to the *LaBelle II* Court, the search of the defendant's backpack was proper because the driver consented to a search of the vehicle and, under those circumstances, the police were authorized to search the entire passenger compartment, including the defendant's backpack. The Court further commented that "the defendant did not assert a possessory or proprietary interest in the backpack before it was searched but, rather, left the backpack in a car she knew was about to be searched." *LaBelle II, supra* at ____.

Updates: Criminal Procedure Monograph 6—Pretrial Motions (Third Edition)

Part 2—Individual Motions

6.28 Motion to Suppress the Fruits of an Illegal Seizure of a Person

On page 72, insert the following text before the paragraph beginning with, “A police officer needs no probable cause . . .”:

Where police officers knocked on a defendant’s door and asked him repeatedly to step outside but did not threaten to compel his exit, did not touch him until after he stepped out of the house, and did not draw their weapons or otherwise make a show of force, the officers did not constructively enter the defendant’s home in violation of his Fourth Amendment right to privacy. *People v Gillam*, 479 Mich 253, 266 (2007). In reaching its conclusion, the Court reviewed cases from the Third, Sixth, Ninth, and Tenth circuit courts of appeals,* all of which are courts that recognize the doctrine of constructive entry (where a suspect leaves his or her home not because of law enforcement’s unlawful physical entry into the home but as a result of coercive police conduct). *Id.* at 261. In a Sixth Circuit case in which the defendant established a case of constructive entry, the circumstances involved “siege tactics” like “encircling of the suspect’s house with nine officers and several patrol cars, the strategic blocking of the suspect’s car with one of the patrol cars, and the use of floodlights and a bullhorn in the dark of night to summon the suspect from the home.” *Gillam, supra* at 262, citing *United States v Morgan*, 743 F2d 1158, 1161, 1164 (CA 6, 1984). In contrast to *Morgan*, the *Gillam* Court noted that “the actions of the officers in the instant case, according to defendant himself, merely involved knocking on his front door and asking him to step outside. *Gillam, supra* at 262.

Also of note according to the *Gillam* Court was the defendant’s initial refusal to leave his home because he was tethered and prohibited from doing so. *Id.* at 256. With regard to the tether, the Court explained that although the defendant’s tether complicated a review of the situation, “[the tether] alone d[id] not lead to a presumption that defendant’s will was overborne by a show of police force.” *Id.* at 266. Instead, the Court reasoned that “armed with a

**Sharrar v Felsing*, 128 F3d 810, 819 (CA 3, 1997); *United States v Al-Azzawy*, 784 F2d 890, 893 (CA 9, 1985); *United States v Maez*, 872 F2d 1444, 1450 (CA 10, 1989). The United States Supreme Court has not yet addressed the issue. *Gillam, supra* at 261.

court order [to remain in the apartment], defendant should have felt reasonably confident in refusing police requests that he leave the apartment.” *Id.*

After its review of the federal case law, the Court declined to recognize the doctrine of constructive entry and stated that even if it was to recognize the doctrine, “defendant in this case would fail to establish that police constructively entered his home in violation of his Fourth Amendment right to privacy.” *Id.* The Court continued, “[I]t being clear that there was no improper entry, constructive or otherwise, defendant was arrested legally, and the trial court erred in suppressing evidence [discovered in defendant’s home].” *Id.*

Part 2—Individual Motions

6.36 Motion to Suppress Evidence Seized Pursuant to a Defective Search Warrant

Insert the following text before the first full paragraph near the top of page 98:

It is unnecessary to determine for purposes of MCL 780.653 whether an anonymous informant had personal knowledge of the information contained in the affidavit on which a search warrant is based when the affidavit contains additional information sufficient in itself to support a finding of probable cause. *People v Keller*, 479 Mich 467, 477 (2007).^{*} In *Keller*, the information contained in the affidavit supported the magistrate's conclusion that it was fairly probable that contraband would be found in the defendants' home because the affidavit was based in part on the small amount of marijuana discovered in the defendants' trash. *Id.* Although the evidence discovered in the defendants' trash did not support the anonymous informant's allegation that the defendants were engaged in drug trafficking, the evidence from the defendants' trash adequately established the probable cause necessary to justify a search of the defendants' home for additional contraband. *Id.* at 483. In other words, even though the anonymous tip prompted the initial investigation into the defendants' possible illegal activity, the marijuana alone supports the probable cause necessary to issue a search warrant and "the statutory requirement that an anonymous tip bear indicia of reliability does not come into play." *Id.*

^{*}Reversing
People v Keller,
270 Mich App
446 (2006).

Part 2—Individual Motions

6.43 Motion to Dismiss—Violation of 180-Day Rule

Insert the following text before the first full paragraph near the top of page 119:

*The 180-day rule applied to the defendant in *Walker* because the *Williams* decision had limited retroactive effect to cases like the defendant's that were pending on appeal at the time *Williams* was decided.

*The trial court was instructed to first determine whether formal notice was given to the prosecutor so that the 180-day period had properly begun.

When MCR 6.004(D) was rewritten, effective January 1, 2006, all references to the prosecution's "good faith efforts" were removed. Although the good faith exception to the 180-day rule was not expressly overruled, "[the Michigan Supreme Court] held that MCR 6.004(D), as it existed pre-2006, 'was invalid to the extent that it improperly deviated from the statutory language' of MCL 780.131." *People v Walker*, ___ Mich App ___, ___ (2007),* quoting *People v Williams*, 475 Mich 245, 259 (2006).

The *Walker* Court, also reiterated the Court's conclusion in *Williams* that nothing in MCL 780.131 created a good faith exception to the 180-day rule as it was previously enumerated in MCR 6.004(D). The *Walker* Court stated:

"Given that MCR 6.004(D)(1) was amended, effective January 1, 2006, to make the rule conform to the 180-day rule set forth in the statute, and given that the amendment removed any mention of good-faith action, it appears that *Williams* implicitly overruled the 'good-faith' exception. Thus, on remand, if the trial court determines that the number of days attributable to the prosecutor exceeds 180,* it should then dismiss the charges, regardless of any 'good-faith efforts' on the part of the prosecutor." *Walker*, *supra* at ___.

Part 2—Individual Motions

6.44 Motion for Change of Venue

Insert the following text before the last paragraph near the bottom of page 120:

See *People v Cline*, ___ Mich App ___ (2007), where, to determine whether the defendant’s counsel was ineffective for failing to bring a motion for change of venue, the Court reviewed the circumstances of the defendant’s case in light of the standards set forth in *People v DeLisle*, 202 Mich App 658 (1993), and *People v Jendrzewski*, 455 Mich 495 (1997), and concluded that “because the [trial] court would not have erred in denying a motion to change venue, defendant was not deprived of his right to a fair trial by defense counsel’s failure to raise such a motion.” *Cline, supra* at ___.

Updates: Criminal Procedure Monograph 6—Pretrial Motions (Third Edition)

Part 2—Individual Motions

6.24 Motion to Dismiss Because of Double Jeopardy—Multiple Punishments for the Same Offense

Insert the following text after the April/May/June 2007 update to page 62:

Under the “same elements” test adopted in *People v Bobby Lynell Smith*, 478 Mich 292 (2007), armed robbery and felonious assault are not the “same offense” for purposes of the multiple punishments strand of double jeopardy because each offense requires for its commission an element not required by the other. *People v Chambers*, 277 Mich App 1, 8-9 (2007). The *Chambers* Court explained that armed robbery, MCL 750.529, does *not* require that an offender actually possess a weapon but *does* require that the assault occur during the commission of a larceny, while felonious assault, MCL 750.82(1), requires that an offender actually possess and use a dangerous weapon during the assault. *Chambers*, *supra* at 8-9. Because the offenses are not the “same offense” under the “same elements” test, the defendant’s convictions and sentences did not violate his protection against having multiple punishments imposed for the same offense. *Chambers*, *supra* at 9.

See also *People v Strawther*, ___ Mich ___ (2007) (no double jeopardy violation where the defendant was convicted of both assault with intent to commit great bodily harm, MCL 750.84, and felonious assault, MCL 750.82).

Part 2—Individual Motions

6.32 Motion in Limine—Impeachment of Defendant by His or Her Silence

Insert the following text before the paragraph beginning with “Cross-examination of a defendant . . .” on page 83:

A prosecutor’s deliberate and repeated use of the defendant’s post-*Miranda* silence for impeachment purposes and as substantive evidence of the defendant’s guilt amounted to constitutional error. *People v Shafier*, ___ Mich App ___, ___ (2007). However, in light of other evidence of the defendant’s guilt, the Court concluded that reversal was not required because the prosecutor’s improper questions and comments concerning the defendant’s silence did not affect the outcome of the lower court proceedings. *Id.* at ___.

Part 2—Individual Motions

6.33 Notice and Examination Requirements for Asserting an Insanity Defense

2. Notice and Examination Requirements

Insert the following text after the first paragraph in this subsection on page 86:

However, the notice requirements of MCL 768.20a do not “come into play until a defendant definitively ‘proposes to offer in his or her defense testimony to establish his or her insanity’” *People v Shahideh*, ___ Mich App ___, ___ (2007). Because “[a] mere request to investigate and examine the viability or feasibility of a potential insanity defense is not sufficient to trigger the statute,” the trial court erred in concluding that MCL 768.20a governed a defendant’s request for a pretrial evaluation by his privately retained psychologist.